SERVED: May 30, 1997

NTSB Order No. EA-4556

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of May, 1997

BARRY L. VALENTINE, Acting Administrator, Federal Aviation Administration, Complainant, v. MICHAEL DEMARCHI, Respondent.	Docket SE-14853

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William E. Fowler, Jr., rendered in this proceeding on April 23, 1997, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed an emergency order of the Administrator revoking respondent's second class medical and commercial pilot certificates for an alleged

[1]An excerpt from the hearing transcript containing the initial decision is attached.

violation of section 67.403(a)(1) of the Federal Aviation Regulations, "FAR," 14 C.F.R. Part 67.[2] For the reasons discussed below, we deny the appeal.[3]

The Administrator's March 19, 1997 Emergency Order of Revocation alleged, among other things, the following facts and circumstances concerning the respondent:

1. You are the holder of SECOND CLASS MEDICAL Certificate Number EE-0382049.

2. You are the holder of a Commercial Pilot Certificate Number 90524400.

3. On or about December 14, 1994, you were issued a Second Class Airman Medical Certificate following a physical examination by Dr. Alan G. Schwartz.

4. On the application for the Second Class Medical Certificate that was issued on December 14, 1994, FAA Form 8500-8, you made a fraudulent or intentionally false statement.

5. Specifically, in response to the question in item (19) on the application as to whether you had made any visits to health professionals within the last 3 years you responded "No."

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[2]FAR section 67.403(a)(1) provides as follows:

§ 67.403 **Applications, certificates, logbooks, reports, and record: Falsification, reproduction, or alteration; incorrect statements.**

(a) No person may make or cause to be made--
(1) A fraudulent or intentionally false statement on any application for a medical certificate or on a request for any Authorization for Special Issuance of a Medical Certificate (Authorization) or Statement of Demonstrated Ability (SODA) under this part....

[3]The Administrator has filed a reply opposing the appeal.

> 6. In fact, you made numerous visits to health professionals during the years 1992 and 1993 in connection with injuries that you may have sustained as a result of an automobile accident.
>
> 7. In addition, on or about December 4, 1996, you admitted under oath, in a court proceeding, that you had made fraudulent and intentionally false statements on your December 14, 1994 Application for Airman Medical Certification, FAA Form 8500-8, by failing to disclose the requested information regarding previous doctor's follow-up visits for the neck injury, as described above.
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> 8. On December 4, 1996, you entered a plea of guilty before a United States Magistrate to a violation of Title 18 to the United States Code Section 1018 (f) because you filed false statements with the Federal Aviation Administration. Specifically, these false statements are the December 14, 1994 statements that you made on your application for a Second Class Medical Certificate FAA Form 8500-8 that are described in paragraphs 3, 4, and 5 of this Order.

Respondent does not on appeal challenge the adequacy of the Administrator's proof on these allegations. Rather, his position on appeal is that the law judge should have imposed a sanction less than revocation for the violation of FAR section 67.403(a)(1) that he sustained. We find no merit in respondent's arguments in support of that position.

Respondent argues first that the law judge's decision is deficient because the sanction of revocation in this matter was not shown to be required by a preponderance of the probative, reliable, and substantial evidence. In fact, according to the respondent, the Administrator introduced no evidence at the hearing demonstrating that respondent lacked the care, judgment, and responsibility required of a certificate holder. Respondent's argument reveals, at best, a basic misapprehension

of the Board's role in reviewing the Administrator's judgments on sanction, and the suggestion that no evidence was advanced to support a conclusion that respondent lacks qualifications borders on the frivolous. Indeed, as to this latter point, the showing that the respondent had pleaded guilty in Federal court to knowingly lying to the Administrator on the medical application at issue in this proceeding is, we think, evidentiary basis enough for concluding that the respondent does not possess the requisite nontechnical qualifications.

It is the Administrator's *charges* against a certificate holder, not the sanction he seeks to have imposed for their commission, that must be proved before the Board by a preponderance of the probative, reliable, and substantial evidence. Since the falsification violation was essentially conceded, and revocation for violations involving false or fraudulent entries on applications is, respondent himself acknowledges, undeniably consistent with Board precedent, the law judge was obliged to affirm the Administrator's judgment on sanction unless the *respondent* advanced evidence in mitigation that warranted a departure from sanction precedent. The fact that the law judge did not so depart prompts the respondent's second argument on appeal; namely, that the law judge failed to consider the assertedly mitigating factors the respondent presented to him.[4]

[4]Respondent's third argument is that the law judge imposed an excessive sanction essentially because he recommended to the Administrator that consideration be given to allowing respondent

While it is not entirely clear from the initial decision whether the law judge agreed with the sanction of revocation or merely thought Board precedent required it, we entertain no doubt that revocation is appropriate. In this connection we should point out that, contrary to respondent's contentions, none of the few falsification cases where the Board has allowed a sanction less than revocation, such as Administrator v. Fallon, 6 NTSB 127 (1988)(sanction less than revocation sustained where falsification disclosed to FAA before their discovery), involved facts even remotely similar to those in this matter. In fact, this case may be in a class by itself.

Rarely does a falsification case contain direct evidence that the respondent meant to answer a question on an application falsely. Here, however, we have respondent's admission, in open court, not only that he chose not to include information about all doctors' visits on the medical certificate application even though he knew that the application required him to provide such information, but also that he was aware that the failure to include the information was a violation of law.[5] See Adm. Exh. A-4, at pp. 23-25. In other words, respondent, in his confession to a criminal offense, has left no doubt that the Administrator

(..continued)
to apply to requalify for his certificates after one year from the date of the law judge's decision. See Tr. at pp. 247-8. The law judge's remarks in this connection do not alter whatever right respondent may have to re-apply one year after the date of the Administrator's revocation order which, of course, predated the law judge's decision by several weeks.

[5]Respondent's conviction on the federal charge resulted in a sentence that includes a year's probation and $10,000 fine.

cannot trust him either to fill out an application honestly or to comply with legal requirements of which he is aware.[6] Such an individual, in our judgment, cannot reasonably claim that he possesses the requisite care, judgment, and responsibility demanded of the holder of *any* airman certificate.

In view of the foregoing, we cannot agree with the respondent that his previously unblemished past, the willingness of several of his former co-workers and his criminal defense attorney to vouch for him despite his conduct in connection with the medical application, or any other matter referenced in his brief warrants any departure from precedent with respect to sanction in this case.

[6]Respondent believes that his failure to list all doctors' visits is not all that serious because the Airman Medical Examiner (AME) who issued the 1994 medical certificate knew of the neck injury and discussed it with respondent, and because other medical applications respondent tendered before and after the one in 1994 contained some information about the injury. We find no mitigation in these circumstances. In the first place, respondent did not just leave off required information, he denied that there was any. Second, whatever may have been respondent's motive for including references to the neck injury or treatment on other applications does not provide any justification for totally concealing information on the application at issue in this case. Third, the AME's knowledge of the injury did not provide him or the Administrator's flight surgeon with necessary information about the medical treatment, medications, or prognoses other health professionals had provided, thereby denying the Administrator their medical judgments about respondent's condition and the ability to consult with them about his progress and recovery.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and

2. The initial decision and the emergency order of revocation are affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.